

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/26/09
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

AUGUSTA RANCH LIMITED)	1 CA-CV 08-0162
PARTNERSHIP, a Delaware limited)	
partnership,)	DEPARTMENT E
)	
Plaintiff/Counter-)	MEMORANDUM DECISION
Defendant/Appellant,)	(Not for Publication -
)	Rule 28, Arizona Rules
v.)	of Civil Appellate
)	Procedure)
THE CITY OF MESA, a municipal)	
corporation,)	
)	
Defendant/Counter-)	
Claimant/Appellee.)	
)	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2004-010320 and CV 2004-014389 (Consolidated)

The Honorable Michael D. Jones, Judge

REVERSED AND REMANDED

Jennings, Strouss & Salmon, P.L.C.	Phoenix
By David B. Earl	
Attorney for Plaintiff/Counter-Defendant/Appellant	
 Mesa City Attorney's Office	 Mesa
By James W. Fritz, Assistant City Attorney	
Attorneys for Defendant/Counter-Claimant/Appellee	

W I N T H R O P, Judge

¶1 Augusta Ranch Limited Partnership ("Augusta Ranch") appeals from the trial court's decision granting the City of Mesa's (the "City") motion to dismiss pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-821 (2003) and 12-821.01 (2003). For the following reasons, we reverse and remand for further proceedings consistent with this decision.

I. FACTS AND PROCEDURAL HISTORY

¶2 This litigation arises out of certain real property transfers, purported transfers, and the related development of a specific parcel (the "Property") and an adjacent parcel of real property located in Mesa, Arizona. After a series of conveyances between the City and other third parties, Augusta Ranch purchased the Property on January 20, 1992. In April 1997, Augusta Ranch agreed to sell a portion of the Property to a developer who then assigned its interest in the agreement to A.R. Development, L.L.C. ("A.R."). In May 1998 and 1999, at the request of the City, A.R. filed and recorded maps of dedication purporting to create easements and rights-of-way encumbering a portion of the Property in favor of the City for public use, including roadways, sidewalks, streetlights, and public utilities. The City was not aware that Augusta Ranch still owned the land, and accepted those dedications. In 2002, acting on the dedications granted by A.R., the City constructed underground electrical power lines, above ground power boxes,

underground telephone lines, curbing, storm drains, a sidewalk, a road, traffic light equipment, and street lights.

¶13 In 2003, A.R. agreed to sell the Property to another developer. At this time, A.R. learned of some uncertainty surrounding the ownership of the Property and requested that Augusta Ranch execute a quit claim deed in A.R.'s favor. After investigating the Property's title, Augusta Ranch determined it had owned the Property, in its entirety, since 1992.

¶14 On April 16, 2004, Augusta Ranch served the City with a notice of claim asserting an entitlement to quiet title.¹ Augusta Ranch subsequently filed its complaint and the City counterclaimed, also seeking to quiet title. On March 20, 2007, the trial court entered summary judgment in favor of Augusta Ranch.

¶15 Having already constructed and maintained the improvements described above, the City obtained leave to amend its counterclaim, and added a claim for condemnation. On August 31, 2007, Augusta Ranch served another notice of claim on the City and at the same time filed an amended complaint and a reply to the City's amended counterclaims, asserting a damages claim for trespass. The City filed a motion to dismiss Augusta

¹ Approximately one month after sending the claim letter, Augusta Ranch claims it learned for the first time that A.R. had granted or dedicated easements and rights-of-way relating to the Property.

Ranch's amended complaint on a number of grounds, including that Augusta Ranch had failed to comply with A.R.S. §§ 12-821 and 12-821.01. The trial court granted the City's motion "[p]ursuant to A.R.S. § 12-821 and 12-821.01."²

¶16 Augusta Ranch timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

II. DISCUSSION

¶17 Augusta Ranch raises the following contentions on appeal:

- (1) Whether it timely filed its notice of claim and amended complaint concerning the trespass claim pursuant to A.R.S. §§ 12-821.01 and 12-821; and
- (2) Whether its notice of claim provided the information required by § 12-821.01.

A. Standard of Review

¶18 The City filed a motion to dismiss, but requested that the motion to dismiss be treated as one for summary judgment because it believed that the court needed to consider matters outside of Augusta Ranch's amended complaint. Notwithstanding

² While the trial court is not required to explain its ruling, see *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 495 n.3, 733 P.2d 1073, 1078 n.1 (1987) (encouraging but not requiring trial courts to articulate reasoning for granting motion for new trial), where, as here, alternative bases were urged for the granting of the motion, some indication by the trial court as to which theory advanced was persuasive would have been helpful for our review and analysis.

the form of the trial court's order, it is apparent that the court considered materials outside of the pleadings; accordingly, we determine *de novo* whether there are genuine issues of material fact and whether the superior court erred in its application of the law. *Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 17, 83 P.3d 56, 60 (App. 2004).

B. Timeliness/Accrual of Cause of Action

¶9 Augusta Ranch argues on appeal that its notice of claim and amended complaint complied with the time restrictions found A.R.S. §§ 12-821.01 and 12-821.

¶10 Section 12-821.01 requires a person to serve a notice of claim on the public entity prior to filing a lawsuit against that public entity and within one hundred eighty days after the cause of action accrues. "[A] cause of action accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition which caused or contributed to the damage." A.R.S. § 12-821.01(B).

¶11 Similarly, § 12-821 requires that "[a]ll actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward."

¶12 Augusta Ranch argues that its notice and amended complaint were timely because the City wrongfully constructed

and continuously maintained improvements on a portion of the Property, thereby constituting a continuing tort. Augusta Ranch argues in part that a claim for continuous trespass does not accrue until the tortious conduct has ceased, see *Sanderson v. Mesa Homeowner's Ass'n*, 183 P.3d 679, 682 (Colo. App. 2008), and that the limitation period does not commence until the date of the last tortious act. See also *Floyd v. Donahue*, 186 Ariz. 409, 413, 923 P.2d 875, 879 (App. 1996) (citing *Garcia v. Sumrall*, 58 Ariz. 526, 533, 121 P.2d 640, 643 (1942)). As noted in *Sanderson*, when a trespasser erects a structure or places something on or underneath another's land, the trespasser's actions constitute a trespass until the harmful condition is removed. 183 P.3d at 682.

¶13 We agree that the City's entry on and improvements to a portion of the Property did not constitute one discrete act. As mentioned above, in 2002, the City constructed underground electrical power lines, above ground power boxes, underground telephone lines, curbing, storm drains, a sidewalk, a road, traffic light equipment, and street lights. These improvements remained on the land after the trial court quieted title in favor of Augusta Ranch. Demonstrating no intention to remove the improvements, the City amended its counterclaim and asserted a new cause of action for condemnation for the portion of the Property containing the improvements. The City's allegedly

wrongful possession did not end until September 6, 2007, when the trial court ordered that the City was entitled to immediate possession and full use of the Property containing the improvements, and awarded Augusta Ranch the fair market value of that portion of the Property. Therefore, we agree the allegations of the City's conduct, if proven, constitute a continuing trespass.

¶14 Even conceding in the abstract that the maintenance of the equipment and improvements on the Property constitutes a continuing trespass, the City argues that the cause of action accrued in 2002 at the latest, and therefore any claim or complaint is barred by the application of the discovery rule in A.R.S. §§ 12-821.01(B) and 12-821. However, the City overlooks the fact that each day a trespass continues, a new cause of action arises. *Sanderson*, 183 P.3d at 682. "[W]here a trespass is continuing in its nature . . . damages may be recovered for all of the statutory period prior to the commencement of the action." *Garcia*, 58 Ariz. at 533, 121 P.2d at 643.

¶15 Application of the City's reasoning would, in effect, either eliminate any recourse for Augusta Ranch for the City's continuing wrongful possession and use of its property (up until the trial court condemned the Property), and/or result in the City obtaining the equivalent of lawful possession and/or *de facto* title to the Property after the passage of one year. We

believe such result would be absurd, and contrary to the clear intent of the common law abolition of governmental immunity in Arizona, and the intent of the legislature when it created the notice of claim procedure in response. Further, to adopt the City's argument would have the same effect as concluding that the City had fulfilled all of the requirements of adverse possession after only the passage of one year.³

¶16 Recently, our supreme court reviewed the policy behind the creation of the notice of claim process. In *Backus v. State*, 220 Ariz. 101, 203 P.3d 499 (2009), the court stated:

These consolidated cases require us to construe the language of § 12-821.01.A. When analyzing statutes, our primary "goal is 'to fulfill the intent of the legislature that wrote [the statute].'" *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996) (quoting *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993)).

The general intent of the statutes governing claims against public entities is clear. When the legislature adopted these statutes in 1984, it explicitly declared the purpose of the legislation:

[I]t is hereby declared to be the public policy of this state that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of this state. All of the provisions of this act should be construed with a view to carry out the above legislative purpose.

³ An adverse possession claim requires showing that possession is actual, open and notorious, hostile, under a claim of right, continuous for a minimum ten-year period, and exclusive. *Rorebeck v. Criste*, 1 Ariz. App. 1, 3-4, 398 P.2d 678, 681 (1965); see generally A.R.S. § 12-526(A) (2003) (requiring ten years of continuous possession).

1984 Ariz. Sess. Laws, ch. 285, § 1 (2d Reg. Sess.) (codified at A.R.S. §§ 12-820 to -823). The act thus codified the holding of *Stone v. Arizona Highway Commission*, that "the rule is [governmental] liability and immunity is the exception." 93 Ariz. 384, 392, 381 P.2d 107, 112 (1963), overruled in part by *Grimm v. Ariz. Bd. of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977). The claims statutes thus advance the overarching policy of holding a public entity responsible for its conduct.

We also construe statutes to give effect to an entire statutory scheme. *Grant v. Bd. of Regents*, 133 Ariz. 527, 529, 652 P.2d 1374, 1376 (1982). The notice of claim statute, § 12-821.01, operates within the general framework of the act defining the scope of claims against public entities. The statute permits an action against a public entity to proceed only if a claimant files a notice of claim that includes (1) facts sufficient to permit the public entity to understand the basis upon which liability is claimed, (2) a specific amount for which the claim can be settled, and (3) the facts supporting the amount claimed. A.R.S. § 12-821.01.A. These statutory requirements serve several important functions: "They 'allow the public entity to investigate and assess liability, . . . permit the possibility of settlement prior to litigation, and . . . assist the public entity in financial planning and budgeting.'" *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 295 ¶ 6, 152 P.3d 490, 492 (2007) (quoting *Falcon ex rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527 ¶ 9, 144 P.3d 1254, 1256 (2006)). Our interpretation of the statute at issue, then, must be consistent with both the general intent of the claims statutes and the intent of the specific statute involved.

220 Ariz. at 104, ¶¶ 8-10, 203 P.3d at 502 (internal footnote omitted).

¶17 To construe the application of the statutes as the City urges here would, in effect, reinstate governmental immunity as it relates to the City's alleged continuing

misconduct. We do not believe this result was intended by our legislature. Instead, we hold that, under these circumstances, Augusta Ranch's notice of claim was timely.

¶18 Here, as mentioned above, Augusta Ranch served a notice of claim on the City on August 31, 2007. While it is true that Augusta Ranch likely knew or had reason to know it had been damaged when the City first constructed the improvements in 2002, a new cause of action arose each day the improvements remained on Augusta Ranch's property. The record is clear that the improvements continuously remained on Augusta Ranch's property. Therefore, Augusta Ranch's notice of claim was timely in regards to the City's continuing trespass for the one year statutory period preceding Augusta Ranch's notice of claim filed on August 31, 2007.⁴ A.R.S. § 12-821.

C. Factual Basis of Claim

¶19 Augusta Ranch also argues that its notice of claim provided a sufficient factual basis for its claim as required by A.R.S. § 12-821.01(A). Section 12-821.01(A) requires a person with a claim against a public entity to submit a claim that contains facts sufficient to permit the public entity to

⁴ The parties have not briefed and we do not address the issue of whether, under these circumstances, the City may assert a defense of laches based upon Augusta Ranch's apparent conscious decision to not state a claim for trespass when it first sought in 2004 to quiet title in the Property containing the City's improvements.

understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. A.R.S. § 12-821.01(A).

¶20 In *Deer Valley Unified Sch. Dist. No. 97*, our supreme court ruled that the plaintiff "fail[ed] to state a specific amount that she would accept to settle her claims" and, therefore, "did not file a valid notice of claim within the statutory time limit." 214 Ariz. at 297, 299, ¶¶ 11, 23, 152 P.3d at 494, 496. The court noted, "the Legislature intended the 1994 [statutory] changes to establish specific requirements that must be met for a claimant to file a valid claim with a government entity." *Id.* at 299, ¶ 21, 152 P.3d at 496. "Claims that do not comply with A.R.S. § 12-821.01.A are statutorily barred." *Id.* at 295, ¶ 6, 152 P.3d at 492 (citations omitted).

¶21 Following *Deer Valley*, our supreme court explained the standard that applies in determining whether a claim adequately states the "facts supporting" the amount claimed required by A.R.S. § 12-821.01(A). In *Backus*, the supreme court stated that "a claimant must explain not only the facts forming the basis of alleged liability, but also the specific amount requested and the facts supporting that amount." 220 Ariz. at 105, ¶ 17, 203 P.2d at 503. However, the court also stated that § 12-821.01(A) does not require a claimant to provide an exhaustive list of

facts and instructed other courts not to scrutinize the claimant's description of facts to determine the "sufficiency" of the factual disclosure. *Id.* at 106-07, ¶ 23, 203 P.3d at 504-05. The court held "that a claimant complies with the supporting-facts requirement of § 12-821.01(A) by providing the factual foundation that the claimant regards as adequate to permit the public entity to evaluate the specific amount claimed." *Id.*

¶22 Here, we agree with Augusta Ranch that its notice of claim complied with § 12-821.01(A). First, its notice of claim contained facts sufficient to permit the City to understand the basis of liability. The claim letter provided that "the City of Mesa has on numerous occasions and for many years trespassed." The claim letter also specifically stated that the trespass claim may be settled for \$198,000. Finally, Augusta Ranch's claim letter provided facts to support the amount claimed as required by *Backus*. The notice stated that "the City has constructed a roadway and related improvements over the property and has permitted the installation of utility equipment on the property."⁵ We therefore hold that Augusta Ranch's notice of

⁵ We also note that, in light of the lengthy related quiet title litigation, the details concerning the City's actions - and, indeed, the factual acknowledgment by the City of such actions - were already well-known to the City.

claim provided sufficient facts in accordance with *Backus* and § 12-821.01(A).

D. Failure to Obtain Leave to Amend

¶23 On appeal, the City argues that the filing of the amended complaint and reply seeking damages for trespass was violative of Rule 15 of the Arizona Rules of Civil Procedure. While technically true - the appropriate practice under Rule 15 is generally to seek leave of court for permission to file an amended pleading - we reject the City's argument for three reasons. First, Augusta Ranch had the right under Rule 7 of the Arizona Rules of Civil Procedure to submit a Reply to the City's amended counterclaim. In that counterclaim, the City asserted a new claim for eminent domain or condemnation, and we see little practical value in striking the relief sought by Augusta Ranch for trespass in its amended complaint while allowing the same claim and relief sought in its Reply. Second, the trial court was clearly aware of the parties' quiet title dispute and its ruling in favor of Augusta Ranch. The City's decision to leave the improvements in place, and to seek leave to amend its counterclaims to assert eminent domain/condemnation, could not have been unexpected. The trial court granted leave for the City to amend its counterclaims, and there is no reason to logically conclude that a similar request by Augusta Ranch concerning its trespass claim would have been denied. Finally,

in light of our interpretation and application of § 12-821 as set forth above, we see no prejudice to the City by allowing the filing of the amended complaint and Reply setting forth the trespass theory and damages claim.

III. CONCLUSION

¶24 For the foregoing reasons, we reverse and remand to the trial court for proceedings consistent with this decision.

LAWRENCE F. WINTHROP, Judge

CONCURRING:

DONN KESSLER, Presiding Judge

SHELDON H. WEISBERG, Judge